MOTION FILED
DEC 9 1980

No. 80-422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, Secretary of Labor,
Petitioner,

v.

STATE OF ALABAMA and STATE OF NEVADA,
Respondents.

On Motion to Consolidate with Respect to Review if the Court Grants Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION for LEAVE to FILE BRIEF AMICUS CURIAE and BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD As Amicus Curiae in Support of Motion to Consolidate

CHARLES ALAN SEIGEL
515 Olive Street, Suite 1700
St. Louis, Missouri 63101
(314) 231-2800
Attorney for Amicus Curiae

Of Counsel:
Philip E. Draheim
Stolar, Heitzmann, Eder,
Seigel & Harris

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

The Lutheran Church-Missouri Synod agrees that the questions presented are as set forth in the Response of States of Alabama and Nevada in Support of the Petition for a Writ of Certiorari filed with this Court (the "Response"), and it hereby incorporates them herein by this reference.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities Cited	iv
Motion for Leave to file Brief of Amicus Curiae in Support of Granting Motion to Consolidate	1
Consent to the Filing Has Not Been Requested Prior to Filing Due to the Extremely Narrow Time Constraints	2
Brief of Amicus Curiae in Support of Granting Motion to Consolidate	1
Introduction	1
Statement of the Case	2
Summary of the Argument	2
Argument	3
Conclusion	5

PRECEDING PAGE WAS BLANK

TABLE OF AUTHORITIES CITED

Cases:

Grace Brethren Church and The Lutheran Church-Missouri Synod v. California, No. CV79-93 MRP . 4

Trinity Evangelical Lutheran Church v. Department of Industrial Relations, No. CV 78 500325-Mc (Ala. Cir. Ct., Jan. 29, 1979) 4

Grace Lutheran Church v. North Dakota Employment Security Bureau, Civ. No. 9719 (S. Dak., June 20, 1980) 4

Lutheran Church-Missouri Synod v. Bowling, No. 501-78 (Ill. Appl Ct., Oct. 1, 1980) 4

Miscellaneous:

Letter from Secretary of Labor Ray Marshall to the Most Reverend Thomas C. Kelly, General Secretary, United States Catholic Conference (April 18, 1978) 3

No. 80-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, Secretary of Labor,
Petitioner,

v.

STATE OF ALABAMA and STATE OF NEVADA,
Respondents.

On Motion to Consolidate with Respect to Review if the Court Grants Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION for LEAVE to FILE BRIEF AMICUS CURIAE and BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD As Amicus Curiae in Support of Motion to Consolidate

---

Motion For Leave To File Brief Of The Lutheran Church—Missouri Synod As Amicus Curiae In Support Of Granting Motion To Consolidate.

The Lutheran Church-Missouri Synod respectfully moves the Court, pursuant to Rules 36 and 42 of its Rules, for leave to file the accompanying brief, amicus curiae, in support of granting the motion of the States of Alabama and Nevada to consolidate.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the fifth largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,800,00 individual members. The congregations of the Synod operate approximately 1,400 elementary and secondary schools situated in most of the states of the United States.

The Lutheran Church-Missouri Synod has been at the forefront of efforts to challenge the Secretary of Labor's interpretation of section 3309(b)(1)(A) of FUTA through administrative and judicial means. Its experiences in those efforts results in it being one of a relatively few national church bodies that are uniquely qualified to present to this Court the vital issues that are presented in this case. The issues presented in this case touch upon the core of religious liberty and the fundamental interests of the Synod and its congregations.

Therefore, The Lutheran Church-Missouri Synod supports the position taken by the States of Alabama and Nevada that the petition for certiorari be granted immediately and that the case be consolidated for review with the case of St. Martin Evangelical Lutheran Church v State of South Dakota.

Consent To The Filing Of The Attached Brief Amicus Curiae Has Not Been Requested Prior To Filing Due To The Extremely Narrow Time Constraints.

The consent of the parties to the filing of the attached brief has not been sought by The Lutheran Church-Missouri Synod. The petition for Writ of Certiorari was filed at the end of the allowable time for doing so and the Synod has acted to support

the prompt response by the States of Alabama and Nevada. The Synod intents to immediately request consents. If obtained, they will be filed with the Court. Since they might not be granted, the Synod is hereby moving for leave to file the attached brief amicus curiae.

Respectfully submitted,

Charles Alan Seigel
515 Olive Street, Suite 1700
St. Louis, Missouri 63101
(314) 231-2800

Attorney for Amicus Curiae

Of Counsel:
Philip E. Draheim
Stolar, Heitzmann, Eder
Seigel & Harris

No. 80-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, Secretary of Labor,
Petitioner,

v.

STATE OF ALABAMA and STATE OF NEVADA,
Respondents.

On Motion to Consolidate with Respect to Review if the Court Grants Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION for LEAVE to FILE BRIEF AMICUS CURIAE and BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD As Amicus Curiae in Support of Motion to Consolidate

BRIEF OF THE LUTHERAN CHURCH—MISSOURI SYNOD

As Amicus Curiae In Support Of Granting Motion To Consolidate

INTRODUCTION

This brief is respectfully submitted by the Lutheran Church-Missouri Synod. The Synod is the second largest Lutheran denomination in North America and the fifth largest Protestant

body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,800,000 individual members. Its congregations operate approximately 1,400 elementary and secondary schools situated in most of the states of the United States.

The Synod has been one of the most active of the church bodies which have challenged the validity of the Secretary of Labor's interpretation of the exemption under FUTA which is at issue in this case.

STATEMENT OF THE CASE

The Lutheran Church-Missouri Synod agrees with that Statement of the Case as set forth in the Response of States of Alabama and Nevada in Support of the Petition for a Writ of Certiorari filed with the Court, and it hereby incorporates it herein by this reference.

SUMMARY OF AGREEMENT

The Lutheran Church-Missouri Synod agrees with all of the arguments presented in the Response. It is filing this brief in particular to underscore the importance of one of the positions taken by the States of Alabama and Nevada (Response pages 4, 9). The Lutheran Church-Missouri Synod believes that if the South Dakota Supreme Court decision (as to which certiorari has already been granted) and the Fifth Circuit decision (for which certiorari is being requested) are considered together, it is more likely that the issues presented under the different subsections of the provisions of FUTA relevant to coverage of employees in church schools will be completely understood so that those issues can be dealt with adequately.

ARGUMENT

The South Dakota Supreme Court did not expressly consider or rule upon the exemption afforded in section 3309(b)(1)(A) of FUTA. The Lutheran Church-Missouri Synod and other major church bodies in the United States have stressed the violence done to legislative intent and religious freedoms under the First Amendment by the Secretary of Labor's interpretation of that section as much or more than the exemption set forth in section 3309 (b)(1)(A). The Fifth Circuit decision, and the factual record developed in that case within the administrative proceedings in which the Department of Labor fully participated, provide an excellent basis for knowing and dealing with all the issues created by the Secretary's interpretation.

The real and present impact of the Secretary's interpretation, as well as its potential significance for future issues, is best perceived by a study of what the section 3309(b)(1)(A) exemption would be if the Secretary would have his way! In place of the legislatively enacted exemption as to service performed "in the employ of . . . a church or convention or association of churches," the Secretary would provide a bureaucratically imposed exemption only as to service performed by employees "engaged in *strictly church duties performed . . . pursuant to . . . religious responsibilities.*"[1] The Lutheran Church-Missouri Synod, in cooperation with its 6,200 congregations and their 2,800,000 individual members, has been responsible for administrative and judicial actions challenging the application of FUTA to its churches with schools in approximately twenty states, has been successful in the federal or state courts in four

---

[1] Letter from Secretary of Labor Ray Marshall to the Most Reverend Thomas C. Kelly, General Secretary, United States Catholic Conference (April 18, 1978).

states[2], and has cases pending in the federal or state courts in an additional eight states. The Synod had been genuinely alarmed by being told by the Secretary of Labor that the elementary and high schools, operated as integral parts of its congregations in carrying out their programs of mission and ministry for 140 years, are not a part of the church and, therefore, are not entitled to the statutory exemption. The Synod, as well as other church bodies, provided information which became a part of the record considered by the Fifth Circuit in dealing with all of the issues raised by the Secretary of Labor's interpretation. Granting the petition for review immediately and consolidating review of the Fifth Circuit decision with review of the South Dakota Supreme Court decision would substantially aid in resolving these important issues.

---

[2] Grace Brethren Church and The Lutheran Church-Missouri Synod v. California, No. CV 79-93 MRP; Trinity Evangelical Lutheran Church v. Department of Industrial Relations, No. CV 78 500325-Mc (Ala. Cir. Ct., Jan. 29, 1979); Grace Lutheran Church v. North Dakota Employment Security Bureau, Civ. No. 9719 (S. Dak., June 20, 1980); Lutheran Church-Missouri Synod v. Bowling, No. 501-78 (Ill. Appl Ct., Oct. 1, 1980).

CONCLUSION

For reasons set forth in the Response, as to one of which The Lutheran Church-Missouri Synod has herein placed emphasis, it is respectfully urged that the Court grant the requested petition for writ of certiorari filed by the Secretary of Labor and that it also consolidate it for review with the case of St. Martin Evangelical Lutheran Church *et al* v. State of South Dakota, No. 80-120.

December 8, 1980

Respectfully Submitted,

CHARLES ALAN SEIGEL,
515 Olive Street, Suite 1700
St. Louis, Missouri 63101
(314) 231-2800
Attorney for Amicus Curiae

Of Counsel:
Philip E. Draheim
Stolar, Heitzmann, Eder,
Seigel & Harris